STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE SCHLACHT and RICHARD SCHLACHT,

Plaintiff-Appellants,

v

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL-LAKESIDE, MERCY MT. CLEMENS CORPORATION, d/b/a ST. JOSEPH MERCY MACOMB, a/k/a ST. JOSEPH HOSPITAL-WEST, and SURINDER S. KOHLI, M.D.,

Defendant-Appellees.

UNPUBLISHED
January 17, 2003

No. 235746
Macomb Circuit Court
LC No. 00-003993-NH

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) in favor of defendants. We affirm.

The following facts are not in dispute. Plaintiff Suzanne Schlacht,[1] a registered nurse and employee of defendant Henry Ford Hospital, began treating with defendant Surinder S. Kohli, M.D., in the early 1990s, and on March 8, 1996, Dr. Kohli performed a caesarean section on plaintiff at defendant St. Joseph Mercy Macomb Hospital. On February 14, 1997, Dr. Kohli performed plaintiff's tubal ligation at defendant Henry Ford Hospital-Lakeside. Interpreting post-surgical x-rays, a radiologist at defendant St. Joseph Mercy Macomb Hospital reported that there was an "approximate 6 mm metallic or other high density needle-like opacity in the soft tissues of the right hemipelvis, suspicious for a foreign body." The report further notes that the radiologist discussed the results of the study with Dr. Kohli on February 20, 1997.

In 1999, the doctor who interpreted plaintiff's IVP study taken at defendant Henry Ford Hospital on September 17, 1999, noted the presence of a 6 mm density "possibly representing

[1] Hereinafter, "plaintiff" in the singular refers to plaintiff Suzanne Schlacht.

the tip end of a needle" on the right side of plaintiff's pelvis. On September 25, 1999, plaintiff received written correspondence from her family practice doctor, Lisa Cohen, D.O., concerning this report and informing plaintiff that "they [sic] may have seen a foreign body on the [right] side of the pelvis." On that same day, plaintiff contacted a surgeon at Henry Ford Hospital whom she knew through her employment there and he agreed to look at the IVP report and informed her that there was a small foreign body in her.

Thereafter, on October 1, 1999, plaintiff consulted a general surgeon, who was doubtful that the foreign body was a broken needle, but rather concluded, according to plaintiff's deposition testimony, that it was possibly a wood chip. Plaintiff then consulted for a second opinion another general surgeon, who told her that there was no need for surgery. In January 2000, plaintiff obtained a third opinion from yet another doctor, who performed laparoscopic surgery on February 14, 2000, to remove the foreign body, which, according to plaintiff, was a metal object appearing to be the tip of a needle.

On March 17, 2000, plaintiffs mailed a notice of intent to file a claim pursuant to MCL 600.2912b. After the expiration of the notice period, on September 27, 2000, plaintiffs filed in circuit court a complaint alleging medical malpractice. Subsequently, plaintiffs filed an amended complaint. Plaintiffs alleged two separate acts of negligence, (1) the failure to detect that a foreign body was left in her body during surgery, and (2) the failure to inform her of the presence of the foreign body after a radiologist detected and reported it.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that the statute of limitations barred plaintiffs' medical malpractice suit. The trial court agreed. In granting summary disposition in favor of defendants, the trial court explained that the six-month discovery provision applied and that although plaintiff "learned of the presence of the needle-like foreign object for the first time on September 25, 1999," the discovery rule did not operate to save her claim because she did not file suit until September 27, 2000. The trial court further concluded that with respect to fraudulent concealment, plaintiffs failed to allege that defendants took some affirmative action or made a misrepresentation to conceal the presence of the foreign body in plaintiff, and silence is insufficient to constitute fraudulent concealment under MCL 600.5855. Plaintiffs moved for reconsideration, which the trial court denied. This appeal ensued.

Plaintiffs argue that the trial court erred in determining that the statute of limitations barred their medical malpractice claims relating to a foreign body being left in plaintiff's pelvis and relating to the nondisclosure of a foreign body present in plaintiff's pelvis. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5); *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Provided no factual disputes exist and reasonable minds cannot differ on the legal effect of the facts, whether the statute of limitations bars a plaintiff's claim is a question of law that we review de novo. *Brennan, supra*.

In general, a plaintiff in a medical malpractice case must bring a claim within two years of the act or omission that forms the basis of the claim, or within six months after the plaintiff discovers or reasonably should have discovered that the plaintiff has a claim, whichever is later. MCL 600.5805(5), 600.5838a(2).

In the present case, plaintiffs concede that their claims were not initiated within two years of the alleged malpractice, but maintain that their claims were filed within the sixth-month period after plaintiff discovered or should have discovered her claims. Thus, we direct our analysis to the six-month discovery rule. With regard to this rule, in *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), our Supreme Court explained:

> This Court adopted the "possible cause of action" standard for determining when the discovery rule period begins to run in *Moll* [*v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993)]. The majority concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action.

As the *Moll* Court explained, "[o]nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll, supra* at 24. Stated another way, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy, supra* at 223.

Moreover, our Supreme Court has set forth some general principles that apply to the discovery rule:

> "Michigan jurisprudence compels not only the use of an objective standard for determining when an injury is discovered, but it also compels strict adherence to the general rule that 'subsequent damages do not give rise to a new cause of action.' . . . The discovery rule applies to discovery of an injury, not to the discovery of a later realized consequence of the injury."
>
> Further, the plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run. [*Solowy, supra* at 223-224, quoting *Moll, supra* at 18.]

The *Solowy* Court further noted that while

> the "possible cause of action" standard requires less knowledge than a "likely cause of action standard," it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the "possible cause of action" standard is not an "anything is possible" standard. [*Id.* at 226.]

To summarize, the *Solowy* Court stated:

> The six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. In such cases, courts should be guided by the doctrine of reasonableness and the standard of due diligence, and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. [*Id.* at 232.]

Here, the trial court did not err in determining that the sixth-month discovery rule period commenced on September 25, 1999, the date that plaintiff received correspondence from her family practice doctor concerning the possibility of a foreign body in her pelvis. On that date, plaintiff knew that there may be a foreign body in her pelvis, and she contacted a surgeon coworker, who looked at her IVP results and relayed that there appeared to be something small inside of her. Further, in her deposition, plaintiff, a registered nurse, admitted that on September 25, 1999, she knew that she had a foreign body in her abdomen and that something had been wrong if there was, in fact, a foreign body left in her body. Plaintiff testified that she understood that the foreign object was a piece of metal. Under these facts and "the possible cause of action" standard, *Soloway, supra* at 221, 225-227, plaintiff, who had undergone a caesarean birth and a later tubal ligation both performed by Dr. Kohli, possessed information that viewed in its totality suggests a nexus between the foreign body being left in her body and the surgeries that she had undergone. *Id.* at 226. Because plaintiff did not file her claim until September 27, 2000, which is after the six-month discovery period plus the 182 days tolling period effectuated by the mailing of the written notice of intent pursuant to MCL 600.2912b, see MCL 600.5856(d), the statute of limitations barred plaintiffs' claims. The trial court did not err in granting summary disposition in favor of defendants with regard to plaintiffs' claim concerning a foreign body being left in plaintiff's pelvis.

Plaintiffs also allege that defendants had information about the foreign body left in plaintiff's body during surgery that Dr. Kohli performed, but fraudulently concealed that information from her. Plaintiffs assert that under some circumstances, "mere silence" on the part of a defendant may constitute an affirmative act of fraudulent concealment and that Dr. Kohli's silence with respect to the foreign body in her hemipelvis "was a deliberate affirmative act of deception under the circumstances of this case." According to plaintiffs, defendants' "fraudulent conduct concealing plaintiffs' cause of action tolled the statute of limitations."

MCL 600.5838a(2)(a) provides that the general accrual and limitation provisions do not apply "if discovery of the existence of the claim was prevented by the fraudulent conduct of the [defendants]." In such cases, Michigan's fraudulent concealment statute, MCL 600.5855, is applicable and provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the

> identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996), this Court explained:

> Under MCL 600.5855, the statute of limitation is tolled when a party conceals the fact that the plaintiff has a cause of action. The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment. The plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. Mere silence is insufficient. [Citations omitted.]

See also *Buszek v Harper Hospital*, 116 Mich App 650, 654; 323 NW2d 330 (1982) ("Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action.").

We reject plaintiffs' contention that mere silence may constitute an affirmative act. *Sills, supra*; *Buszek, supra*. Here, plaintiffs provided only conclusory allegations and failed to demonstrate an affirmative act or misrepresentation, thus the trial court properly granted summary disposition in favor of defendants with respect to plaintiffs' claim of fraudulent concealment.

Finally, to the extent that plaintiffs argue that the trial court erred in finding that the statute of limitations barred their medical malpractice claim relating to the nondisclosure of a foreign body present in plaintiff's pelvis, we disagree. Even though plaintiffs assert that it was only after plaintiff's medical records were obtained and reviewed after September 25, 1999, that plaintiffs discovered a cause of action for nondisclosure, the possibility of a claim of nondisclosure existed at the same time that plaintiff received word of a foreign body in her hemipelvis. Although plaintiff may not have known which doctor allegedly concealed this information, the fact that the foreign body was present and no doctor until her family practice doctor informed her of this presence, is sufficient information to make plaintiff aware that a possible cause of action existed and from which to pursue this claim. See *Solowy, supra* at 221-223.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage